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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, et al.,

Appellants,

v.

CITY OF NEW YORK, et al.,

Appellees.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., et al.,

Appellees.

On Appeal From The United States District Court For The District of Columbia

BRIEF FOR REPRESENTATIVES HENRY A. WAXMAN, DAVID E. SKAGGS, AND LOUISE M. SLAUGHTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF HOUSE AMICI

Amici are members of the House of Representatives. Representative Henry A. Waxman represents the Twenty-ninth Congressional District of California, Representative David E. Skaggs represents the Second Congressional District of Colorado, and Representative Louise M. Slaughter represents the Twenty-eighth Congressional District of New York. They all voted against the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, codified at 2 U.S.C. §§ 691 *et seq*, (the "Act"). In addition to their argument that the Line Item Veto Act is unconstitutional, *Amici* submit this brief to present to the Court the separate argument that the Act is inseverable because inclusion of all three types of spending was essential to passage of the Act.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief principally to demonstrate that tax benefit and direct spending provisions are not severable from the remainder of the Line Item Veto Act of 1996. As we argue in Part I, Congress's decision to subject all three types of spending -- discretionary spending, new items of direct spending, and limited tax benefits -- to the President's "cancellation" power was critical to the delicate compromise that was required to secure enactment of the Act. Therefore, even though the Line Item Veto Act could still be "fully operative as a law" even if the President's power to cancel

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[1] Pursuant to S. Ct. Rule 37.6, no part of this brief was drafted by any of the parties in this action, and no one other than *Amici* or their counsel have paid for preparation or submission of this brief.

new items of direct spending and limited tax benefits were taken away, leaving only the power to cancel discretionary spending items, the entire Act should be stricken.

In Part II, *Amici* present a brief argument on the merits. Specifically, *Amici* argue that five aspects of the cancellation power demonstrate the legislative character of the powers granted to the President under the Act. We also show that the statutes identified by the government and its *amici* provide no precedent for the transfer of legislative powers to the President under the Act and that, therefore, the Act is an unconstitutional attempt to expand the President's Article I powers. Before turning to the merits arguments, and in order to understand why the Act is not severable, it is necessary to discuss the legislative history of the Line Item Veto Act in the 104th Congress in some detail.[2]

THE LEGISLATIVE HISTORY OF THE LINE ITEM VETO ACT OF 1996.[3]

The Line Item Veto Act originated in the 104th Congress's Republican majority's "Contract With America."

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[2] *Amici* also fully support the standing of the sets of plaintiffs before this Court. Both lost a valuable benefit through the President's cancellation of items in the Balanced Budget Act and the Taxpayer Relief Act, respectively, and, thus, have sustained injuries that will be redressed by a favorable ruling on the constitutional issue.

[3] A summary of the legislative history of the Act was also submitted in the Joint Appendix in *Raines v. Byrd*, No. 96-1671, at 67-90.

As the history of the Act shows, Congress decided to enact a "strong" version of item veto authority, ceding to the President the power to eliminate spending items permanently, without requiring further Congressional action, and to include the authority to delete not only discretionary spending items, but also new entitlements and certain tax benefits as essential elements of the compromise bill that was ultimately enacted.

On January 3, 1995, H.R. 2, titled "The Line Item Veto Act," was introduced and referred to the Committee on Government Reform and Oversight. *See* H.R. 2, 104th Cong. 1st Sess. (1995). The bill was a broad-ranging "enhanced rescission" line item veto, under which the President had twenty days after a bill was enacted to veto items which he disapproved. It permitted the President to "rescind all or part of any discretionary budget authority." § 2(a). The President's authority was not limited to items in the statute itself, but included identifiable items in the legislative history. The bill provided that any budgetary authority that was rescinded "shall be deemed cancelled unless" Congress overrode it, § 3(a)(1), and that "any provision of law *vetoed* under this Act . . . shall be deemed *repealed* unless . . . a rescission/receipts disapproval bill restoring that provision is enacted into law." § 3(a)(2) (emphasis added). In addition, it also authorized the President to "*veto* any targeted tax benefit" (one limited to a few persons), subject to the same two-thirds override. § 2 (emphasis added).

In the Senate, two principal item veto bills were introduced. S. 4, an "enhanced rescission" bill, was substantially the same as H.R. 2, except that it did not permit item vetoes of tax expenditures. *See* S. 4, 104th Cong., 1st Sess. (1995). Like H.R. 2, it required a two-thirds override,

allowed the President to reduce as well as eliminate items of budgetary authority, and was not limited to items appearing in an appropriations bill itself. *See* S. Rep. No. 9, 104th Cong., 1st Sess. (1995); S. Rep. No. 13, 104th Cong., 1st Sess. (1995). The other vehicle, S. 14, was an "expedited rescission" bill providing for a mandatory and expedited vote on the President's proposed rescissions which included new items of direct spending and tax expenditures. *See* S. 14, 104th Cong., 1st Sess. (1995). Under it, however, the President's proposals would not become effective without Congressional approval. *See* S. Rep. No. 10, 104th Cong., 1st Sess. (1995); S. Rep. No. 14, 104th Cong., 1st Sess. (1995). Both bills were referred jointly to the Committees on Budget and on Governmental Affairs.

On January 12, 1995, the House Government Reform and Oversight Committee held a joint line item veto hearing with the Senate Government Affairs Committee. *See Line-Item Veto: Joint Hearing Before the Comm. on Gov. Reform and Oversight House of Reps. and Comm. on Gov Affairs, Senate*, 104th Cong. 1st Sess. (1995). In his introductory remarks, Rep. Clinger, the Chair of the House Government Reform and Oversight Committee, recommended H.R. 2, in part because it included limited tax benefits: "These types of excesses, both taxing and spending, must be controlled, and H.R. 2 will provide us with a much-needed tool to help in that effort." *Id.* at 2; *see also id.* at 3 (Statement of Rep. Morella, emphasizing that H.R. 2 would allow deletion of "targeted, special-interest taxbreaks"). In his testimony, Robert D. Reischauer, Director of the Congressional Budget Office, warned the Committee that including tax and direct spending provisions would make the law more difficult to administer and vulnerable to legal challenge. *Id.* at 63-70, 74.

Testifying for the Administration, Alice Rivlin, Director of the Office of Management and Budget, expressed support for a "strong version" of the item veto. She praised H.R. 2 because, unlike S. 4, it extended the President's cancellation powers to limited tax benefits. In fact, Director Rivlin urged the Committee to expand the tax benefit provision: "A broader complement of tax items would complement the application of a line-item veto to all items of budget authority." *Id.* at 50.

On January 18, 1995, the Senate Budget Committee held hearings on both S. 4 and S. 14. In his opening statement, Chairman Domenici stated that he preferred S. 14, the "expedited rescission" alternative, because S. 4 involved a "maximum shift in power." *Line-Item Rescission Authority: Hearings on S. 4 and S. 14 Before The Comm. on the Budget*, 104th Cong., 1st Sess. 2 (1995). In the words of its sponsors, S. 14 would have "guarantee[d] the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority." *See* S. Rep. No. 9, at 15 (additional views of Sen. Domenici). In addition, Sen. Domenici noted that S. 14 provided for rescission of direct spending -- an expanding portion of the federal budget -- as well as appropriations. *Hearings on S. 4 and S. 14*, at 2; *see also id* at 3 (Sen. Exon, co-sponsor of S. 14: "while Sen. McCain's bill applies only to appropriations . . . our bill applies to appropriations, new entitlements and new targeted tax benefits").

S. 4's sponsors, Sens. McCain and Coats, defended their bill. But when questioned, they too acknowledged interest in broadening S. 4 to reach tax benefits and direct spending, although they cautioned that they would only want

to see these additions if it would enhance, and not hinder, the likelihood of passage of an item veto bill. *Id.* at 50. In his testimony, Sen. Bradley urged the Committee to address wasteful spending in special interest tax benefits, as much as or even more than in appropriations. *Id.* at 58-68. Just as she had done for H.R. 2, Director of OMB Rivlin testified in support of S. 4. *Id.* at 68-76. Nonetheless, she emphasized that the Administration would prefer a bill that included limited tax benefits and had the broad definition of "targeted tax benefits" under S. 14, rather than the more narrow definition under H.R. 2. *Id.* at 71.

Shortly thereafter, on January 24, 1995, the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary held a hearing to consider two proposed constitutional amendments, S.J. Res. 2 and S.J. Res. 16. *See The Line-Item Veto: A Constitutional Approach: Hearings before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong., 1st Sess (1995). Appearing for the Administration was Assistant Attorney General Walter Dellinger of the Office of Legal Counsel, who stated that the President supported a "strong line-item veto" bill, in particular S. 4. *Id.* at 33. He expressed his opinion that S. 4 is "clearly constitutional" as "a very strong delegation of authority to the President . . . not to expend appropriated funds . . .." *Id.* at 34. He also stated quite clearly what he thought would *not* be constitutional: a literal line item veto. Citing what he called "a long tradition at the Office of Legal Counsel," and invoking the views of three of his predecessors, he stated that all of them "have agreed the President does not at present have that power constitutionally." *Id.* at 36. "Congress cannot literally give the President a line item veto power by

statute, and . . . attempts that appear to literally give the President a line item veto by statute are also constitutionally invalid." *Id*; *see also id.* at 38.

In his prepared statement, Mr. Dellinger explored at greater length the constitutionality of S. 4 and other pending bills. While defending "enhanced rescission" as a lawful delegation to the President of discretion over spending appropriated funds, he expressed doubts about the constitutionality of extending that power to targeted tax benefits, as had been done in H.R. 2, because it purports "to authorize the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal.'" *Id.* at 49. He then observed that "use of the terms 'veto' and 'repeal' is constitutionally problematic [because Article I, § 7 of the Constitution] provides that the President only can exercise his 'veto' power before a provision becomes law." *Id.* He also observed that "the word 'repeal' suggests that the President is being given authorization to change existing law on his own [which] arguably would violate the plain textual provisions of Article I, Section 7 of the Constitution, governing the manner in which federal laws are to be made and altered." *Id.* Mr. Dellinger's method of avoiding these "constitutional shoals" would be to "recast" H.R. 2 so that it "eliminates the word 'veto' from the targeted tax benefit provision, and confers on the President the power to *suspend* (rather than 'repeal') such benefits." *Id.* (emphasis in original). These changes, which were never made, would "preserve the purpose of the provision" and "would place the targeted tax benefit provision on the same defensible constitutional footing as the provision regarding rescission of budget authority." *Id.*

A markup of H.R. 2 was held on January 25, 1995,

and the bill was reported favorably, with amendments, by a roll call vote of 30-11. *See* H.R. Rep. No. 11, 104th Cong., 1st Sess. 12 (1995). There were several committee decisions of note. The period during which the President had the right to veto items was shortened from the original twenty calendar days (not including Saturdays, Sundays, or holidays), to ten calendar days, not including Sundays. *Id.* at 2. The term "targeted tax benefit" was expanded so that the maximum size of the group of taxpayers whose benefits could be vetoed went from five to 100. *Id.* at 2, 26, 27.

The House Report was clear about the purpose of H.R. 2: the bill "strengthens the President's ability to rescind (cancel) appropriated funds. It also allows the President to *eliminate* targeted tax benefits . . .. " *Id.* at 8 (emphasis added); *see also id.* at 10 (budget authority or targeted tax benefits will automatically be "terminated" after fixed number of days unless Congress acts by bill or joint resolution to disapprove President's proposal). Much of the Committee Report focused on the perceived need to reach tax benefits. In an oft-cited example, the Report discussed how, as the Revenue Act of 1992 made its way through Congress, 50 special tax breaks were added that, in the end, completely outspent the cost of the Act's enterprise zones and led to a Presidential veto. *Id.* at 8. "The special tax benefits . . . covered such interests as special exemptions for certain rural mail carriers, special rules for Federal Express pilots, deductions for operators of licensed cotton warehouses, exemption for some small firearm manufacturers, and exemptions for certain ferry operators." *Id.* The Line Item Veto Act was intended, in part, as a direct response to the perceived evil of special interest tax breaks.

House floor consideration of the bill occurred on February 2, 3, and 6, 1995. *See* 141 Cong. Rec. H1078-1142; 1168-91; 1225-64 (daily ed.). A major focus of the debate was the scope of the cancellation powers under H.R. 2 and concerns that the Act might not do enough to control the two main areas of spending growth: tax benefits and direct spending (entitlements). *See, e.g.*, H1094 (Rep. Moran); H1101-02 (colloquy between Reps. Barrett and Blute). At the same time, in urging adoption of the "expedited rescission alternative, opponents of the bill cited Mr. Dellinger's testimony that the power to eliminate tax benefits may be unconstitutional. *See, e.g.*, H1082 (Rep. Beilenson).

Three separate efforts to broaden the authority of the President to eliminate tax benefits of various kinds were defeated. *See* 141 Cong. Rec. H1116, H1125, H1168, H1170, H1235, H1255 (daily ed.). Rep. Slaughter introduced an amendment to broaden the tax benefit provision to any tax benefit that would have the effect of treating differently "a particular taxpayer or limited class of taxpayers" except based on certain demographic conditions. H1116. Arguing against the Slaughter amendment, Rep. Blute defended H.R. 2 as a compromise: "We accepted a bipartisan amendment to change the definition to include 100 or fewer taxpayers to get at rifle shots or special deals." H. 1120. Although the debate on the extent of the power to cancel tax benefits was lively, no one questioned the integral nature of the tax benefit provision to passage of the entire legislation.

The single most crucial vote was on an "expedited rescission" substitute offered by Reps. Wise, Stenholm, and Spratt. Expedited rescission, like the mechanism in S. 14, would have established procedures for voting on a President's

proposed rescission under the Impoundment Control Act of 1974, 2 U.S.C. § 688. Even though 342 Members of the House had voted for this approach in 1994, H1171-72, H1245, and even though there was no question as to the constitutionality of expedited rescission, H1185, the House twice voted it down. H1242-56. At the end of the lengthy debate, a vote to recommit to Committee with instructions to broaden the tax benefit provision was defeated, largely along party lines, by a vote of 185-241. H1263.

Back in the Senate, on February 22, 1995, the Senate Budget Committee reported out S. 4 with amendments, but without recommendation. *See* S. Rep. No. 9, at 13. The Budget Committee also reported out S. 14 with some small changes to the bill, but keeping the essential feature that rescissions would not take effect until Congress had affirmatively approved them. *See* S. Rep. No. 10, at 9. In addition, S. 14 would apply to "targeted tax benefits" which, like the House's version, were limited to 100 or fewer persons. *Id.*

The next day, the Senate Committee on Government Affairs held an additional hearing on S. 4 and S. 14. Sen. Glenn and others expressed interest in extending any item veto bill to tax benefits and in adopting a broader definition of tax benefit than only provisions affecting 100 or fewer taxpayers. *See S. 4 and S. 14, Line Item Veto, Hearing Before the Comm. on Gov. Affairs*, 104th Cong., 1st Sess. 5 (1995). Sen. McCain, testifying in favor of S. 4, conceded that there were valid policy reasons for including tax benefits. *Id.* at 20. The Committee also heard testimony that S. 4 was unconstitutional and ill advised, in part because it would permit cancellation of existing entitlements. *Id.* at 32

(Testimony of A. Schick, Professor, George Mason Univ.). Nonetheless, shortly thereafter, the Government Affairs Committee reported S. 4 as passed by the Budget Committee, and S. 14, without recommendation and with no further amendments. S. Rep. No. 13, at 6; S. Rep. No. 14, at 6, 11.

S. 4 then went to the Senate floor where it was considered on March 16, 17, 20, 21, 22 and 23. *See* 141 Cong. Rec. S4074-89, S4125-45, S4153-96, S4212-60, S4295-4358, S4409-87 (daily ed.). Almost immediately, the Senate leadership announced that the "enhanced rescission" version of the line item veto would not, in fact, be the approach that the leadership supported. *See* S4075. Instead, debate would be on a "separate enrollment" proposal, on which bills had been introduced, but which had not been the subject of mark-up or hearings in any of the relevant committees. S4075-76. Although the mechanisms for the two alternatives differed, the goals and results were the same: to give the President the power to accept some spending and tax items, while rejecting others.

Majority Leader Senator Dole introduced the separate enrollment substitute. *See* S4188-89. Under separate enrollment, once an appropriations bill passed both Houses in agreed-upon form, the enrollment clerks would divide the unified bill into as many separate bills as there were separate items of spending. Those bills would then be voted on together, but each would be presented separately to the President for his signature. In addition to the change in the mechanics of the line item veto, the new S. 4 added targeted tax benefits and new direct spending as subjects on which the President could exercise his veto. S4189. Sen. Dole emphasized that the new S. 4 was a consensus bill that took

into account the views of Sens. Bradley, Stevens, and others that all three types of spending should be covered. S4190. Sen. Domenici, a sponsor of S. 14, announced that he could support the Dole substitute in part because it applied to all types of spending. S4193. Sen. Bradley, who had previously questioned the lack of tax benefits in the old S. 4, also expressed support for the compromise. S4221-22.

On the Senate floor, Sen. Simon proposed an expedited judicial review amendment. S4244. Sen. McCain stated that he was "in agreement, except with one caveat:" that a severability clause be added so that if "one minor provision of the Act is declared unconstitutional, I would not want the entire Act to be declared unconstitutional." S4244-45. Shortly thereafter, the Senate agreed to the Simon amendment, which included the following severability provision:

> If any provision of this Act, or the application of such provisions to any person or circumstances is held unconstitutional, the remainder of this Act and the application of the provisions of such Act to any person or circumstances shall not be affected thereby.

141 Cong. Rec. S4259.

An important theme throughout the Senate floor debate was that the inclusion of the authority to item veto limited tax benefits and direct spending was an essential element of the ultimate compromise. *See, e.g.*, S4125-26 (Sen. Stevens, promising to fight for bill if amended to reach tax benefits and entitlements); S4123 (Sen. McCain); S4127 (Sen. Coats);

S4131 (Sen. Dorgan, tax provisions); S4161 (Sen. Reid, taxes); S4174 (Sen. Lott, tax deals); S4220 (Sen. Coats, tough negotiations to bring in tax and entitlement aspects); S4234 (Sen. Coats, describing direct spending and tax benefits); S4296 (Sen. Santorum, explaining bill "was drafted to have bipartisan support" and reached tax benefits and entitlements); S4301 (Sen. Bradley, acknowledging inclusion of tax benefits); S4303 (Sen. Wellstone, same); S4306 (Sen. Daschle, "I am gratified that our Republican colleagues agree with Democrats that tax breaks should be on the table."); S4316 (Sen. Lautenberg, same); S4356 (Sen. Coats, describing compromise reached between sponsors of S.4 and S.14 to include tax benefits); S4420 (Sen. Kyl, emphasizing importance in obtaining support from Democrats of tax benefits, lock box, and sunset provisions); S4464 (Sen. Exon, "critical areas of targeted tax benefits and entitlements"); S4477 (Sen. Heflin, acknowledging importance of compromise); S4478 (Sen. Biden, "a major improvement of this proposal . . . is that it includes . . . tax expenditures").

Similar to Rep. Slaughter's amendment to broaden the definition of tax benefits, Sen. Bradley, joined by Sens. Wellstone, Robb, Glenn, and Kohl, proposed an amendment to broaden the definition of tax benefits in S. 4. *See* S4301. Sen. McCain, however, opposed the Bradley amendment. S4306. In a colloquy between Sens. Bradley and McCain, Sen. McCain, nonetheless, pledged to fight in the Conference for stronger language on taxes than was currently in H.R. 2. *See* S4308. Shortly after that colloquy, Sen. Bradley's amendment was voted down by a very narrow margin, 50-48.

See S4323.[4]

A substitute "expedited rescission" alternative, which was very similar to S. 14, was introduced by Sens. Daschle, Exon, and Glenn, and a motion to table it passed by a vote of 62-38. *See* S4428. With more than sixty Senators voting to reject the "expedited rescission" substitute, passage of a separate enrollment bill was assured. When the final vote was taken on S. 4 on March 23, 1995, 69 voted in favor and 29 opposed. S4484-85.

By September 11, 1995, Conferees had been appointed, and OMB Director Rivlin, on behalf of the Administration, wrote to Majority Leader Dole to urge completion of the legislation and to reiterate the President's preference for enhanced rescission rather than separate enrollment as the strong form of line item veto. She also offered a few "technical improvements": (1) adopt a more workable definition of targeted tax benefits; (2) extend rescission authority to new direct spending, as the Senate had; (3) substitute the words "deny the availability of" and "suspend" for the use of "veto" and "repeal" in the tax benefit provision; (4) increase the time to exercise a veto from ten to twenty days; (5) include a severability provision; and (6) delete the three-judge court requirement. *See* Joint Appendix in *Raines v. Byrd*, at 91-93.

On March 21, 1996, nearly a year after different bills

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[4] Senator Daschle, Senate Minority Leader, later emphasized how important Sen. McCain's commitment to fight for inclusion of strong tax benefit language was to Democrats to garner their support for S. 4. S4354-55.

had passed both Houses, the Conferees reached agreement. *See* Line Item Veto Act, H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996) (hereafter "Conf. Rep."). Other than using the bill number S. 4 as the vehicle, the conference version is quite similar to H.R. 2. First, the chosen form of the line item veto is not separate enrollment, but enhanced rescission. *Id.* The Conferees reduced to five days the time in which the President can exercise his veto authority after signing. *Id.* The President is given authority to "cancel" in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. 2 U.S.C. § 691(a). With respect to discretionary budget authority, "cancel" is defined to mean "rescind." 2 U.S.C. § 691e(4)(A). With regard to items of new direct spending, such as new entitlements or increases in existing entitlements, and limited tax benefits, the term "cancellation" means "to prevent [the item] from having legal force or effect." 2 U.S.C. § 691e(4)(B), (C). The Conference Report states, "[t]he term 'cancel' is specifically chosen, and carefully defined in section 1026. The conferees intend that the President may use the cancellation authority *to surgically terminate federal budget obligations.*" Conf. Rep. at 20 (emphasis added).

As in the versions that passed both Houses, the President's authority in the enacted bill is not limited to items specified in the legislation itself. The veto power reaches not only the "entire dollar of budget authority" that is "specified in an appropriation law," but also amounts "required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." 2 U.S.C. § 691e(7)(A)(i). The cancellation authority also extends to amounts "represented separately in any table, chart or

explanatory text included in the statement of managers or the governing committee report accompanying such law." 2 U.S.C. § 691e(7)(A)(ii).

Line item veto of "limited tax benefits" remains basically as it was enacted in both Houses. "Limited tax benefits" are "any revenue-losing provision" that provides a "deduction, credit, exclusion, or preference" to 100 or fewer taxpayers during any fiscal year, unless it is a transition provision, in which case the number of taxpayers is 10 or fewer. 2 U.S.C. § 691e(9)(A). Although the Conferees also included a judicial review provision, the severability provision added in the Senate was deleted, but with no explanation for its elimination. 2 U.S.C. § 692.

Not surprisingly, once agreement had been reached, the floor debates on March 27 and March 28, 1996, primarily explained what had already taken place. *See* 142 Cong. Rec. S2929-95 (daily ed.); 142 Cong. Rec. H2971-3028 (daily ed.). Testimonials were offered by those who supported the bill and by those who had once opposed it but now had changed their minds, pleased with the results of the Conference Committee's work. *See, e.g.*, 142 Cong. Rec. S2955 (Sen. Stevens) ("At my request, this bill has been expanded and broadened to cover not only appropriations for specific projects but tax breaks and entitlements as well."). One last effort was made to stop the bill on the Senate floor. Sen. Byrd moved to recommit the Conference Report with instructions to substitute S. 14 in its place. S2949. The motion was tabled by a vote of 58 to 42, and the bill passed 69-31. *See* S2995. The proceedings on the House floor also produced an unsuccessful attempt to recommit, H.3024-25, which failed by a vote of 192-228, followed by final passage

on a vote of 328 to 91, H3028, and signature by the President on April 9, 1996. *See* Public L. No. 104-130, 110 Stat. 1200 (1996).

ARGUMENT

I. THE LINE ITEM VETO ACT IS INSEVERABLE BECAUSE THERE IS ABUNDANT EVIDENCE THAT, BUT FOR THE INCLUSION OF TAX BENEFITS AND DIRECT SPENDING, THE ACT WOULD NOT HAVE BECOME LAW.

At issue in this case are the President's cancellation of a new item of direct spending (section 4722(c) of the Balanced Budget Act) and a limited tax benefit (section 968 of the Taxpayer Relief Act). Thus, the President's cancellation of a discretionary spending item has not yet been brought before this Court. Nonetheless, as we demonstrate in Part II, the Court should conclude that the entire Act is unconstitutional as applied to all three types of spending because it purports to give the President the power to unilaterally repeal portions of duly enacted laws. The power to permanently repeal laws, whatever their character, is a power subject to the "single, finely wrought and exhaustively considered" lawmaking process in Article I, and may not be circumvented without constitutional amendment. *See INS v. Chadha*, 462 U.S. 919, 951 (1983).

In the alternative, as we now show, the Court should hold that the entire Act must be stricken because the power to cancel tax benefits and entitlements is unconstitutional, and because the legislative history of the Act makes abundantly clear that Congress would not have passed the Act unless it

had made all three types of spending provisions subject to cancellation. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-86 (1987). Under that approach, the Court would not need to reach the merits of the government's claim that Congress may delegate expansive powers over discretionary spending to the President, which is based on its contention that there are substantial historic antecedents supporting the discretionary spending provisions of the Act. *Cf. Chadha*, 462 U.S. at 931 n.7 (addressing severability question before constitutional question). Appellants' delegation argument has no relevance to the cancellation of direct spending items and limited tax benefits because there is no history for them remotely supportive of the Government's position. Indeed, the assertion of a power in the President, even with Congressional approval, to eliminate lawfully-vested tax benefits and entitlements, such as those at issue here, is wholly unprecedented. Therefore, by ruling that the three types of cancellations under the Act are inseverable, the Court could reserve for another day the question of whether a statute allowing the President to cancel only discretionary spending could pass constitutional muster.

The standard for severability of an unconstitutional provision is well-established: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independent of those which are not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines*, 480 U.S. at 684 (severing legislative veto provision from Airline Deregulation Act); *see also Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin Refining Co. v. Corporation Comm'n of the State of Georgia*, 286 U.S. 210, 234 (1932)). Here, there is no question that the power to cancel discretionary spending

items could remain "fully operative as a law" even if the tax benefits and new items of direct spending provisions were excised.

However, to sever the tax benefits and direct spending provisions and leave only discretionary spending would create a Line Item Veto Act which there is every indication that Congress would not have enacted. Since legislative intent is the touchstone of severability, *Alaska Airlines*, 480 U.S. at 684 n.5, it would do violence to the compromise reached in Congress and with the President to sever the tax benefit and direct spending provisions, leaving only the powers over discretionary spending. In the words of this Court in *Alaska Airlines*, the statute would not be able to "function in a manner consistent with the intent of Congress." *Id.* at 685. Thus, the answer to the question whether Congress would have passed this Act if it had known that it could not lawfully authorize cancellation of tax benefits is plainly "no." *See United States v. NTEU*, 115 S. Ct. 1003, 1025 (1995) (O'Connor, J. concurring in judgment and dissenting in part). *Amici* draw the Court's attention to six indicators of Congress's intent to include all three spending provisions as inseverable parts of the President's cancellation authority.

First, inclusion of the tax and direct spending provisions was critical to achieving compromise, both in the Senate, and between the Senate and House in the Conference. In the House, although the original tax benefit provision in H.R. 2 applied to provisions affecting only five or fewer taxpayers, it was broadened in committee to reach those benefitting 100 or fewer taxpayers. *See* H.R. Rep. No. 11, at 26-27. As a result, the Joint Committee on Taxation identified 79 tax benefits in the Taxpayer Relief Act of 1997

that fell under the definition of "limited tax benefits." *See* Pub. L. No. 105-34, § 1701, 111 Stat. 1099-1103. Perhaps even more significantly, in the Senate, two bills, S. 4 and S. 14, were introduced, but only S. 14, the expedited rescission version, reached tax benefits. *See supra* p. 4. As the bills moved through committee, however, it became evident that, unless tax benefit provisions were added to an enhanced rescission bill, there would be substantial support for S. 14, precisely because it reached tax benefits. Thus, when the Dole substitute (S. 4 as separate enrollment) was brought to the Senate floor, it contained tax benefit and direct spending provisions, in order to win the support of prominent supporters of S. 14 and others who likely would have opposed the original S. 4. *See supra* p. 11-13. Many would-be opponents of the old S. 4 (Sens. Bradley, Domenici and Stevens, for example) switched their support to the bipartisan compromise. Clearly, the new S. 4 was seen as an improvement over the original S. 4, in large part because of the inclusion of tax benefit and direct spending provisions.[5]

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[5] In fact, the legislative history demonstrates that, but for the inclusion of tax benefit and direct spending provisions in the Dole substitute, there would likely not have been votes for cloture on S. 4. Only after inclusion of these provisions in S. 4, were there sufficient votes in the Senate to table S. 14, and even then the vote was very close, considering that it only takes forty votes to block cloture. *See supra* p.14. Therefore, only by picking up votes by adding tax benefit and direct spending provisions, was there sufficient compromise to send an enhanced rescission bill to Conference. Indeed, after the Conference, when tax benefits were included in the final bill, a vote to table Sen. Byrd's expedited rescission

(continued...)

Second, Congress's objective in passing the Act was to control "special interest" spending. Thus, the critical importance of cancelling tax benefits as a means of achieving this goal was repeatedly stressed in hearings, committee reports, floor debate, and communications with the President's representatives. Numerous times Members observed that the proposed legislation was meritorious *precisely because* it addressed what was perceived to be the most pernicious form of special interest spending -- limited tax benefits. *See, e.g.*, H.R. Rep. No. 11, at 8. Specifically, a number of Members noted that any special interest lobbyists worth their salt know that the way to secure special benefits for their clients, is to secure tax breaks, rather than to seek discretionary spending, which is strictly controlled through pay-as-you-go caps and is under limitations in the budget growth control legislation. *See, e.g.*, S4125 (Sen. Stevens) ("If this bill is not expanded to allow the President to veto new entitlement programs or additions to direct spending programs, the new tools would be limited, and about 50 percent of the total spending would be put off limits."); H1116 (Rep. Slaughter) ("Every forward-looking lobbyist knows that tax breaks are the future of pork."); S4193 (Sen. Domenici) ("From a spending control perspective, the only portion of the budget that is under control is discretionary spending."). Other Members emphasized that tax breaks are more likely to benefit the wealthy and that the Act would receive their support precisely because it empowered the President to prevent such bold raids on the public fisc. *See*

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[5](...continued)
substitute garnered only 58 votes, still 2 short of the number needed to defeat cloture. *See supra* p. 16.

supra pp. 4, 8, 12-13.

Thus, severing the two provisions and leaving the one would frustrate the Congressional objective. In the words of this Court, severance would "alter the substantive reach of the statute" and change its "basic operation," two factors weighing against a ruling of severability. *See United States v. Jackson*, 390 U.S. 570, 586 (1968); *see also Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality) (severability depends on whether policies Congress sought to advance by enacting statute can be effectuated even though provision is unenforceable). In fact, if Congress had known that the only constitutional way to reach tax benefits was to adopt an expedited rescission alternative, there would likely have been wide support for pursuing expedited rescission so as not to risk losing the tax benefit provision altogether.

Third, there was substantial testimony in both the House and the Senate that inclusion of the tax provisions likely would risk invalidation of the statute on constitutional grounds. No less than four times during consideration of the Act did prominent authorities caution Congressional committees that allowing cancellation of tax benefits created that risk. Assistant Attorney General Dellinger gave the most forceful testimony about the constitutionality of extending the enhanced rescission power to targeted tax benefits. To avoid any constitutional defect, he recommended "recast[ing]" H.R. 2 to "eliminate[] the word 'veto' from the targeted tax benefit provision, and confer[] on the President the power to *suspend* (rather than 'repeal') such benefits." *See* Testimony of Walter Dellinger, *supra* p. 7; *see also* Testimony of Robert Reischauer, *supra* p. 4; Testimony of A. Schick, *supra* pp. 10-11. On behalf of the Administration, in her September

1995 letter to Majority Leader Senator Dole, OMB Director Rivlin recommended that the Conference substitute the word "suspend" for veto or repeal. *See* Rivlin Letter, *supra* p. 14. Despite all of these warnings, Members were so desirous of including tax benefits and direct spending with discretionary spending that Congress included all three spending items on an equal footing in the Act.

Fourth, even though amendments to further broaden the definition of tax benefits were defeated in both Houses, the debate surrounding those amendments makes clear that tax benefits were considered to be an integral part of the Act. *See supra* pp. 9, 13-14. Indeed, that debate revealed that the bill supporters considered it vital to reach compromise language on tax benefits in order to respond to objections that the original provisions did not go far enough. *See id.* Most significantly, Sen. McCain, a cosponsor of S. 4 and a conferee, pledged to Sen. Bradley during a floor colloquy to fight for strong language on tax benefits in Conference, 141 Cong. Rec. S4308, and only after that pledge was Sen. Bradley's amendment narrowly defeated. S4323. Indeed, at no time did anyone question that tax benefits were an integral feature of the Act. *Compare Alaska Airlines*, 480 U.S. at 691-93 (legislative history demonstrates scant attention to unconstitutional legislative veto provision held to be severable).

Fifth, the President's representatives repeatedly weighed in with requests that tax benefit and direct spending provisions be included in any bill. *See* Testimony of Alice Rivlin, *supra* pp. 5,6 *see also* Rivlin Letter, *supra* p. 14. In a March 20, 1995 letter to the Senate, President Clinton urged passage of a bill containing tax as well as spending provisions,

141 Cong. Rec. S4186 (Sen. McCain), and in his signing statement, the President emphasized that the Act allowed him to reach both spending and taxes. *See Statement by President Upon Signing S. 4, Line Item Veto*, 1996 WL 165190 (April 9, 1996).

Sixth, the severability provision that had been added to S. 4 in the Senate was deleted in Conference. It is normally true that the absence of a severability clause "is just that -- silence -- and does not rouse a presumption of severability." *See Alaska Airlines*, 480 U.S. at 686 (citations and internal quotations omitted). In this case, however, a severability clause agreed to on the Senate floor by bill sponsor and conferee Sen. McCain was nonetheless removed in the Conference Committee, giving rise to a strong inference that Congress did not intend to allow for severability of any significant portion of the Act. Therefore, this is not a case like *New York v. United States*, 505 U.S. 144 (1992), where Congressional silence on severability was appropriately taken not to create a presumption either way. *Id.* at 186-87. Indeed, the severability clause was removed in Conference despite a specific request from the Administration that it be included in the final bill. *See* Rivlin Letter, *supra* p. 14.

The touchstone of severability is legislative intent. Here, where there is abundant evidence that but for the inclusion of all three spending items, Congress would not have passed any line item veto bill; that the tax benefits provision was of critical importance to so many of the bill's proponents, that Congress deliberately set aside warnings that the statute would be on uncertain constitutional ground if they included tax benefits, and, finally, in Conference Committee, that the severability provision was removed, Congress's intent

to enact an inseverable statute is overwhelming. To sever the direct spending and tax benefit provisions, while leaving the discretionary spending provision, would create a statute that there is no evidence Congress would have passed. *Compare Alaska Airlines*, 480 U.S. at 691-93 (legislative history supports conclusion that Congress would have passed labor protection provisions of Airline Deregulation Act even without legislative veto provision); *Jackson*, 390 U.S. at 585-91 (history of enacting Federal Kidnapping statute demonstrated that Congress would have enacted the statute even without the death penalty).

Unlike in *Alaska Airlines*, *Jackson* or other severability cases, where there were good reasons to conclude that Congress would have passed the same Act, even without the offending provision, there is no evidence that Congress would have passed the Line Item Veto Act without the critically important tax and direct spending provisions as integral features.

II. THE LEGISLATIVE CHARACTER OF THE CANCELLATION POWER GRANTED UNDER THE ACT DEMONSTRATES THAT THE ACT IS AN UNCONSTITUTIONAL EXPANSION OF THE PRESIDENT'S ARTICLE I POWERS.

As *Amici* see the basic dispute in this case, the constitutionality of the Line Item Veto Act depends on whether the power of cancellation given to the President is a legislative or executive function. If it is the former, then it cannot stand because the Constitution limits the President's legislative powers to those set forth in Article I, § 7, which appellants admit do not include a line item veto. On the other

hand, if the cancellation authority is no more than a typical Article II administrative power to "Take Care that the Laws be faithfully executed," then it is constitutional.

Rather than repeating the full range of merits arguments, *Amici* will respond only to the principal claim of appellants and their *amici* that the Act is no different from a variety of other statutes which they contend are constitutional. At the outset we note that many of the laws relied on have never been reviewed by this Court or, in most cases, any other court, and some of the powers have never even been exercised. Thus, they are precedents for the Act in only the most tenuous manner. But regardless of whether they have been reviewed, none of them creates powers for the President that approach the legislative power of cancellation contained in the Act. In particular, there are five essentially legislative features of the cancellation power that distinguish it from powers created by these other laws.

First, and most significant because it separates the power of cancellation from the powers granted in most of the laws cited by appellants, decisions to cancel are permanent and may be reversed only by a new law. *See* 2 U.S.C. § 691b(a). As this Court observed in *Chadha*, a governmental action is assessed for separation of powers purposes "by the character of the . . . action it supplants." 462 U.S. at 952. Thus, because a cancellation supplants a part of a law, and in turn can only be supplanted by a new legislative act of Congress, passed under Article I, the cancellation power is legislative, in contrast to the vast array of administrative decisions that can be replaced by other administrative decisions made by officials of the executive branch under Article II.

Second, there are only five days within which a cancellation may be exercised. *See* 2 U.S.C. § 691a(B), 691a(C)(1). Most delegations have no time limits at all, and we are aware of none that has so short a time frame, let alone one that is tethered to the law's enactment. A cancellation may be made the instant that a bill becomes a law, and it has the same real-world effect as if the President struck the cancelled item before the bill became a law. Moreover, the cancellation power may be used only if the President signs the bill, 2 U.S.C. § 691(a), but not if it becomes a law by a veto override or a lapse of time without his signature. These uniquely legislative features further support the conclusion that the line item veto is essentially a legislative power.

Third, in large part because of the timing limitations, there are no unknown conditions on which the exercise of the power to cancel might depend. Under the Act, cancellation is not predicated on contingencies depending on the actions of a third party (such as another country in the tariff cases), or on the needs of an executive department to carry out its mission (the early department budget laws and the reorganization acts), or on whether the appropriated funds can be usefully spent (the Anti-Deficiency Act). Congress knows everything that the President knows, yet the Act gives him the final say on which portions of the law shall remain operative. His cancellation power is thus not the power to administer the law, but the power to determine which portions of the law shall live and which shall die, precisely what each House of Congress does when it legislates and determines which provisions to include in a bill.

Fourth, the only limitations imposed by the Act -- that the cancellation reduce the deficit, not impair essential federal

government functions nor harm the national interest, 2 U.S.C. § 691(a)(A), -- are, for all practical purposes, no limits at all. In contrast, in most of the statutes relied on, there are considerable constraints on the exercise of the delegated power, either because of required findings that must precede the exercise of a power, or because the range of options is narrow, or for other reasons. Moreover, the exercise of the power of cancellation is entirely discretionary -- the President can cancel every item covered by the Act, none, or any combination in between -- as he and he alone decides. Furthermore, the only arguably substantive limitations under the Act are no more than a restatement of what every President does when he decides whether to exercise his constitutional veto power under Article I, § 7 -- determine whether an item (instead of an entire bill) is in the national interest. In these respects, the President's essentially unfettered choice on which items to cancel mirrors his choice on which bills to veto in their entirety, thereby lending additional support for the conclusion that the power to cancel is legislative and not executive.

Fifth, other than a constitutional challenge, there is no judicial check on the exercise of the power of cancellation. Although appellants and their *amici* rely heavily on note 16 in *Chadha*, they conveniently omit the sentence contrasting the legislative veto with routine administrative action: "That kind of [routine] Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953-54 n.16. By contrast, under the Act, cancellation is almost *never* (not *always*) subject to check because there are essentially no limitations on the power to cancel, and there is

no judicial review, not only because there is none provided for, but because there would be nothing for a court to review since the Act contains no "check by the terms of the legislation," as *Chadha* envisions for an "Executive action." Just as the legislative power of the President to sign or veto an entire bill is not subject to judicial review, neither is his choice of which items covered by the Act should be cancelled, confirming once again that cancellation is essentially a legislative, not executive, action.

It may be that, standing alone, a law that contained one of the foregoing features -- it authorized the President to take actions that are permanent and irrevocable, required that actions be taken immediately after passage, required that actions be based on conditions also known to Congress, required that actions be based on extremely broad standards, or exempted the President's actions from judicial review -- would be constitutional. The difference here is that the Act has not merely one or two, but every one of these essentially legislative features, unlike every other law cited by its supporters. Indeed, other than the fact that the power to cancel is exercised by the President, there is *nothing* about it of an executive, rather than legislative, character. It is for these reasons, as well as those given by appellees and their supporting *amici*, that the Line Item Veto Act is unconstitutional.

CONCLUSION

This Court should affirm the decision of the district court and declare the Line Item Veto Act of 1996 unconstitutional.

Respectfully submitted,

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